ADVERTISEMENT.

THIS Letter was written to a Member of Parliament in Ireland, where an Act is now depending to extend the Habeas Corpus Act of 31 C. II. to that Kingdom.—But a Clauſe is propoſed to be added, enabling the Privy Council to ſuſpend the Act in Times of public Danger.

ACCOUNT
OF
SOME PROCEEDINGS
ON THE
WRIT OF HABEAS CORPUS.

THE right of an Engliſhman to his Habeas Corpus has ever been eſteemed the moſt valuable part of his birthright.—Mr. Selden calls it the higheſt remedy in law for any man that is impriſoned—Lord Bolingbroke ſtyles it, "that noble badge of liberty which every Briton wears, and by which he is diſtinguiſhed ſo eminently not from ſlaves alone, but even from the freemen of other countries;"—and Sir William Blackſtone terms it, "our ſecond Magna Charta and ſtaple bulwark of our liberties."

But after all the ſucceſsful ſtruggles that have been made to confirm this right; and although the wiſeſt and ableſt men have at different times modelled the law to what they thought the point of efficacy; yet ſo it happens, that neither Magna Charta (which is properly our firſt Habeas Corpus Act) nor the petition of right, nor the ſtatute of Charles the IId. have given adequate powers to that guardian of Engliſh liberty.

Numa, a little before his death, burnt all his written inſtitutes—and it was a maxim of the Spartan legiſlator, never to commit a law to writing; for he ſaid that all written laws were like cobwebs which held ſmall inſects faſt, but great ones eaſily broke through them.—

This opinion is ſtrongly verified by the pretences that have been found to break through the law of Magna Charta, which ſays, " nullus liber " homo capiatur vel impriſonetur niſi per judicium parium vel per " legem terræ."—Theſe words ſeem as explicit and as incapable of evaſion as words can be; but unfortunately the queſtion has been, what is meant *per legem terræ?* To expound the law of the land is the province of the Twelve Judges, who till of late years were dependent on the crown, and who generally made the rule of government their rule of law. Magna Charta, you know, gave no new rights, but is merely declaratory of thoſe which exiſted at Common Law before that period.

It will be unneceſſary to trouble you with remarks of any older date than the beginning of the reign of King Charles the Iſt. when the judges were unanimouſly of opinion that the right of the king to inflict impriſonment, was ſo much above the ſubjects' right to liberty, that they refuſed to deliver on the writ of Habeas Corpus any man that was impriſoned, whether cauſe or no cauſe of impriſonment was aſſigned, if the commitment was *Per mandatum Domini regis.*

The firſt conflicts betwixt Charles the Iſt. and his parliament ended in the petition of right.—The material circumſtances which brought on that renewal of Magna Charta (for ſuch the Petition of Right properly is) were principally theſe:—In 1626 the king, after the uſual ſupplies were granted, made a new demand of ſubſidies, which his miniſters would fain have perſuaded the Commons to grant: they refuſed not to give the money, but inſiſted on a previous enquiry into grievances: the king, rather than ſuffer that chapter to be opened, diſſolved the parliament with a threat that, " *he would take more care of the Commons than they had done of themſelves, and make as good a ſhift for himſelf as he could without them.*"

During the ſeſſion, the Earl of Arundel had been committed to the Tower; as were Sir John Elliot and Sir Dudley Diggs; one of whom had

had *opened*, and the other *concluded*, an impeachment of the Duke of Buckingham.

The king to make good his threat of *ſhifting for himſelf* iſſued his writs for the levying of ſhip money. They met with many an honeſt heart to reſiſt them; but of the lower people who refuſed to ſubſcribe to the loan, ſome were impreſſed into the *land*, others into the *ſea* ſervice; and of the members of the laſt Parliament, Sir Thomas Wentworth (afterwards the great and unfortunate Earl of Strafford*) with his friend Mr. Ratcliffe, Sir Walter Earl, Sir John Strangeways, Sir Thomas Grantham, Sir John Hevingham, Sir Nathaniel Barnardiſton, Sir Harbottle Grimſton, Mr. Coriton, and Sir Edward Hampden, were committed to various priſons; and Sir John Elliot was thrown into the Gatehouſe.—Of the gentlemen who were impriſoned five brought their Habeas Corpus, namely, Sir Thomas Darnel, Sir John Corbett, Sir Walter Earl, Sir John Hevingham, and Sir Edward Hampden: the judges made a great merit of iſſuing the writ, but on their being brought before the court they remanded them to priſon, after delivering their unanimous judgment, that as *they were committed by the King's authority, and no cauſe of commitment ſhewn*, the court was obliged to *remand* them.

On the calling of a new parliament the next year, twenty-ſix of the rank of Knights, and about fifty-one gentlemen of landed property, who had refuſed to pay ſhip money, were releaſed from their impriſonment on that account.

The firſt buſineſs of this parliament was to appoint a committee of grievances, whoſe immediate conſideration was the impriſonment of all theſe perſons; and the inſtance they choſe to proceed upon was, that of Sir John Hevingham and the others, who had brought their Habeas Corpus, and after their caſe had been argued were remanded to priſon, and the judgment of the court thereupon entered.

* Ruſhworth, Vol. I. p. 422

The

The Houſe reſolved, *nemine contradicente*,

1ſt. That no freeman ought to be detained or kept in priſon, or otherwiſe reſtrained by the command of the king, or the privy-council, or any other, unleſs ſome cauſe of the commitment, detainer, or reſtraint be expreſſed; for which by law he ought to be committed, detained, or reſtrained.

2d. That the writ of Habeas Corpus may not be denied, but ought to be granted to every man that is committed or detained in priſon, or otherwiſe reſtrained, though it be by the command of the king, the privy-council, or any other, he praying the ſame.

3d. That if a freeman be committed or detained in priſon, or otherwiſe reſtrained by the command of the king, the privy-council, or any other, no cauſe of ſuch commitment, detainer, or reſtraint being expreſſed, for which by law he ought to be committed, detained, or reſtrained, and the ſame be returned upon a Habeas Corpus, granted for the ſaid party, then he ought to be delivered or bailed.

In conformity to theſe reſolutions the Petition of Right was formed, and paſſed the Commons; but an amendment was added by the Lords in theſe words: "*We preſent this our humble petition to your Majeſty, with a care not only of preſerving our own liberties, but with due regard to leave intire that Sovereign Power wherewith your Majeſty is truſted for the protection, ſafety, and happineſs of the people.*"

Sir Edward Coke (ſo famed for his legal knowledge and writings) Mr. Selden, Mr. Glanville, and Mr. Pymm were then members of the Houſe of Commons. The drift of the amendment could not eſcape their diſcernment. They ſaw that by the * *intire reſervation of ſovereign*

* Edward I. when he aſſented to Magna Charta, added theſe words, *Salvo ſemper jure coronæ:* for which the people curſed him;——and, in the 27th year of his reign, when the barons called upon him to ſign it over again, they inſiſted on his leaving out that obnoxious reſervation of Salvo ſemper jure coronæ.

power,

power, inſtead of adding a new guard to the liberty of the ſubject by the Petition of Right, they ſhould recognize an authority in the king to exerciſe that very tyranny which they were endeavouring to ſuppreſs.—At a conference with the Lords, theſe great men pointed out the nature and tendency of this reſervation of *ſovereign power*.—The Lords gave up their amendment, and the Petition of Right was carried up to the throne.

King Charles now gave the firſt public ſpecimen of that talent for evaſion, which contributed to his ruin more perhaps than any other of his unhappy qualities.

Inſtead of the plain and ſimple form of paſſing Acts of Parliament, viz. *Le Roi le veut*, he uſed theſe words: "*The King willeth that right be done according to the laws and cuſtoms of the realm: and that the ſtatutes be put in due execution, that his ſubjects may have no cauſe to complain of any wrong or oppreſſions, contrary to their juſt rights and liberties, to the preſervation whereof he holds himſelf in conſcience as well obliged as of his prerogative.*"

The Commons were ſure to be diſſatisfied with ſo ridiculous an attempt to rob their law of its force.—They demanded a clear and ſatisfactory anſwer, which the king at length gave with that ſort of compulſion which creates diſtruſt inſtead of confidence, and ſcorn inſtead of gratitude. But ſo faſt did Charles the Iſt. cling to this twig of a ſuſpending power over the writ of Habeas Corpus, that, at the cloſe of the ſeſſion, he ordered the *evaſive* inſtead of the *real* anſwer to be inſerted in the Journals.—He went further—He publiſhed many thouſand copies of his *evaſive* anſwer, and diſperſed them throughout all the kingdom, totally ſuppreſſing that which the Commons had obliged him to render—At the opening of the next parliament the record and publication of this baſe falſhood were diſcuſſed and ſtigmatized *.

* Ruſhworth.

The king however ſoon diſſolved this parliament, as he had done the laſt, in anger, and then let them ſee that their Petition of Right was a mere cobweb in his hands.

On the morning that a prorogation was expected, the Commons came to three reſolutions concerning the increaſe of popery, and the levying of ſhip money.

But the ſpeaker (Sir John Finch, who a few days before had refuſed to put a queſtion moved by Sir John Elliott) pleaded the king's command to decline putting the reſolutions to the Houſe. At this inſtant the black rod gave his three taps, but the doors were locked, and the ſpeaker was forcibly held in the chair till the reſolutions * had been read and agreed to.

Immediately on the adjournment, and before the diſſolution, nine members of parliament were ſummoned before the council, of whom Mr. Holles, Mr. Coriton, and Mr. Valentine appearing, and *refuſing to anſwer out of parliament what was ſaid and done in parliament*, were committed cloſe priſoners to the Tower; and the ſtudies of Mr. Holles and Sir John Elliott were ſealed up, the parliament ſtill ſitting.—Six days after this proceeding the king came with an angry ſpeech and diſſolved the parliament.—Four of theſe gentlemen, of whom Mr. Selden was one,

* The reſolutions were:

1ſt. Whoſoever ſhall bring in Innovation of religion, or by favour or countenance ſeek to extend or introduce popery or arminianiſm, or other opinion diſagreeing from the truth and orthodox church, ſhall be reputed a capital enemy to the kingdom and common-wealth.

2d. Whoſoever ſhall counſel or adviſe the taking and levying of the ſubſidies of tunnage and poundage, not being granted by parliament, or ſhall be an actor or inſtrument therein, ſhall be likewiſe reputed an innovator in the government, and capital enemy to the kingdom and common-wealth.

3d. If any perſon or merchant whatſoever ſhall voluntarily yield or pay the ſaid ſubſidies of tunnage and poundage, not being granted by parliament, he ſhall likewiſe be reputed a betrayer of the liberties of England, and an enemy to the ſame.

applied

applied for their Habeas Corpus; but their priſons were changed, and ſo to evade the ſervice of the writ, upon every Habeas Corpus they were ſhifted from one gaol to another.—At the beginning of June the king wrote a letter to the judges, wherein he ordered them to let none of theſe perſons come before them till *they had given ſome demonſtration of their civility and modeſty*.—But after they had lain in priſon all the ſummer, the king told the judges, who attended him upon his command, that "*he had given up the proceſs in the Star-chamber, and left the priſoners to the judgment of the court*."—Accordingly the firſt day of term they were brought to Weſtminſter-hall, and the court propoſed to deliver them on *their giving bail, and finding ſureties for their good behaviour*.—The bail was immediately tendered, but they refuſed to be *bound in ſureties for their good behaviour*.—Mr. Selden, for himſelf and his fellow ſufferers, aſſigned reaſons for this refuſal *. They were all remanded to the Tower.—The proſecution againſt Mr. Long went on in the Star-chamber; that of the others in the King's Bench. Their plea there was, that *as the offences were ſuppoſed to have been done in parliament, they ought not to be puniſhed in this court or any other, excepting parliament*. They were ruled to plead further, but on declining ſo to

* Mr. Selden's plea was this, viz.

1ſt. The caſe here had long depended in court (and they have been impriſoned for theſe thirty weeks) and it had been oftentimes argued on the one ſide and the other, and thoſe that argued for the king, always demanded that we ſhould be remanded, and thoſe which argued on our ſide, deſired that we might be bailed or diſcharged: but it was never the deſire of the one ſide or the other that we ſhould be bound to the good behaviour: and in the laſt term four ſeveral days were appointed for the reſolution of the court, and the ſole point in queſtion was, *if bailable* or not; therefore he now deſires that the matter of bail and of good behaviour may be ſevered, and not confounded.

2d. Becauſe the finding of ſureties for good behaviour is ſeldom urged upon returns of felonies or treaſons; and it is but an implication upon the return, that we are culpable of thoſe matters which are objected.

3d. We demand to be bailed in point of right; and if it be not grantable of right, we do not demand it; but the finding of ſureties for the good behaviour is a point of diſcretion merely; and we cannot aſſent to it, without great offence to the parliament, where theſe matters, which are ſurmiſed by the return, were acted; and by the ſtatute of 4 Hen. VIII. all puniſhments of ſuch nature are made void, and of none effect: Therefore, &c.

do,

do, judgment paſſed as if they had made no defence at all, and the puniſhment (which the judges very gravely told them was laid with a *tender and light hand*) was,

1ſt. That every of the defendants ſhall be impriſoned during the king's pleaſure: Sir John Elliott to be impriſoned in the Tower of London, and the other defendants in other priſons.

2d. That none of them ſhall be delivered out of priſon until he give ſecurity in this court for his good behaviour, and have made ſubmiſſion and acknowledgment of his offence.

3d. Sir John Elliott, inaſmuch as we think him the greateſt offender, and the ringleader, ſhall pay to the king a fine of £2000, and Mr. Holles a fine of 1000 marks; and Mr. Valentine, becauſe he is of leſs ability than the reſt, ſhall pay a fine of £500; and to all this all the other juſtices with one voice accorded.

Of theſe illuſtrious patriots ſome died, and ſome remained in priſon till the opening of the enſuing parliament, twelve years afterwards.

The firſt act of the glorious parliament of 1640 was, to make ſome reparation perſonally to thoſe who ſurvived, and to the executors of thoſe who had periſhed. A ſpecial committee was appointed to examine after what manner Sir John Elliott came to his death, his uſage in the Tower, and to view the rooms and places where he was impriſoned. The *vigorous and great* ſpirit of this gentleman was tackt to an infirm conſtitution of body; he had an aſthma when committed to the Tower. He made ſeveral repreſentations of his condition to the king, which were all diſregarded. At length Lady Elliott preſented a petition, with a certificate of the phyſician, to ſay, that he could not live many days unleſs permitted to go into the country, or at leaſt to be removed into a wholeſomer apartment in the Tower: (for it ſeems he was put into a low, damp room near the Thames.) Lady Elliott was attended by

by twenty peers of the firſt diſtinction, who offered to be bound in £20,000 each for his appearance, when the term of ſuch relaxation as he might be indulged with ſhould expire. But the king was deaf to their prayers, and Sir John Elliott died in leſs than eight-and-forty hours after the fruitleſs application of his wife and friends *.

I have been the more particular in theſe facts, becauſe they ſhow how little any written law avails, when the execution of it is entruſted to arbitrary men; ſince the very members of parliament, who framed the Petition of Right, to render every ſubject ſecure in the claim to his Habeas Corpus, were themſelves denied all benefit of that law. The judges, who were ſworn to fulfil it, aſſumed a juriſdiction over parliament itſelf, in order to defeat every end and purpoſe of that clear and poſitive ſtatute in ſupport of univerſal liberty.

The next period in which the Habeas Corpus came in queſtion was the reign of the ſecond Charles.—The practice in his father's time of removing priſoners from one gaol to another, and ſtanding out the different writs before an attachment could iſſue, produced the famous ſtatute in the 31ſt of Charles the IId. called the Habeas Corpus Act †.—

* 15th article of the remonſtrance preſented to King Charles, 1ſt December 1641.

The impriſonment of the reſt, which refuſed to be bound, ſtill continued, which might have been perpetual, if neceſſity had not the laſt year brought another parliament to relieve them; one of whom (Sir John Elliot) died by the cruelty and harſhneſs of his impriſonment, which would admit of no relaxation, notwithſtanding the imminent danger of his life did ſufficiently appear by the declaration of his phyſician; and his releaſe, or at leaſt his refreſhment, was ſought by many humble petitions. And his blood ſtill cries either for vengeance, or repentance of thoſe miniſters of ſtate, who have at once obſtructed the courſe, both of his majeſty's juſtice and mercy.

† On the ſtate trials, during the plots and conſpiracies ſo frequent in that reign, it was the practice to impriſon perſons whoſe evidence might be neceſſary to detect the guilt of ſuch as they wanted to ſave; or to prove the innocence of ſuch as they wanted to convict; and the method taken was to take up theſe people either for real or ſuppoſed crimes, and then, by changing their places of confinement, and by ſtanding out the different writs of Habeas Corpus, to detain them in priſon till thoſe trials were over, on which they deſired to ſuppreſs their evidence.

This Act cuts off all the proceſs of intermediate writs, and brings a priſoner before the court upon the ſervice of the firſt writ. It obliges the chancellor and all the twelve judges to grant the writ in Vacation time; and it prevents all perſons under reſtraint from being removed from one priſon to another. Whereas the Habeas Corpus at Common Law iſſues from the King's Bench only. In Term time, it is applied for by motion to the court, on ſtating ſome probable grounds to ſhow, that the party is detained without juſt cauſe. In Vacation it iſſues by Fiat from the Chief Juſtice, or other judge of the King's Bench, before whom it is returnable. —But the ſtatute, whilſt it cuts off the powers of evaſion and delay, removes likewiſe all pretences to diſcretion in the judge; for inſtead of allowing him any right to *deny*, he is compelled under the impreſſion of a penalty to grant the writ *inſtantaneouſly*—The Habeas Corpus Act was therefore received as a new æra in the Hiſtory of Engliſh Liberty, as it ſeemed to reduce from theory to practice all thoſe declaratory rights to perſonal freedom, which Magna Charta and the Petition of Right had aſſerted in ſtrong but unavailing terms.—We ſhall quickly ſee how ingenuity, not force, has been employed to break the web of this ſacred and important law.

In 1704, on the famous caſe of Aſhby and White, the ſubject of Habeas Corpus was much agitated; the writs then iſſued were marked Per Stat. 31ſt. Car. II. but eleven of the judges held the ſame opinion of a commitment of the Houſe of Commons, which the judges of the preceding reign held of a warrant *Per mandatum domini regis*. Lord Chief Juſtice Holt ſingly differed from the reſt; but the ſolidity of his argument, the ſoundneſs of his learning, and the intrepid ſpirit which that great man exerted againſt the violent proceedings of the Prerogative lawyers, and Tory leaders of the Houſe of Commons, not only raiſed him to the higheſt degree of public eſteem, but carried along with him the general ſenſe of the people, and the judgment of the Houſe of Lords.

Among the peers he was particularly ſupported by Lord Somers, Lord Wharton, and the Duke of Devonſhire.—In the Houſe of Commons

mons by Sir Joſeph Jekyll, Mr. Cooper, afterwards Lord Chancellor, the Marquis of Hartington, and Sir Robert Walpole.

The repreſentation made by the Lords was compoſed by Lord Somers, as was the reſolution which their lordſhips paſſed upon this occaſion; it is conſonant to thoſe reſolutions which preceded the Petition of Right, but more conciſe; being thus expreſſed:

Resolved, That any Engliſhman, who is impriſoned by any authority whatſoever, has an undoubted right by his agents or friends, to apply for, and obtain a writ of Habeas Corpus, in order to procure his liberty by due courſe of law.

A new revolution in the ſyſtem of Habeas Corpus took place on the acceſſion of Lord Mansfield to the ſtation of Lord Chief Juſtice of England. His lordſhip began the innovation on the following occaſion:—A writ of Habeas Corpus was granted by Judge Foſter in vacation time, on the application of the friends of the Counteſs of Ferrers, who was confined, and in danger of periſhing by the cruelties of her huſband.—Lord Ferrers treated the writ with contempt.—The writ being returnable on the firſt day of Term, an attachment againſt Lord Ferrers was moved in open court. Sir Michael Foſter immediately ſpoke to his having granted the writ, and approved the motion of attachment. Lord Mansfield heſitated, but on that day ſeemed to have no doubt but this: *Whether the attachment of a Peer would not be a breach of privilege*; Foſter inſtantly and ſharply replied, " *'twas a breach of the peace, and therefore no privilege was in the caſe:*"—*If it was ſo* (ſays he) *that peers were privileged in a caſe where life's in danger, our lives would all be at their mercy, which God forbid!*" Lord Manſfield required three days for conſideration before he gave his judgment (this was a dreadful interval of *danger* to Lady Ferrers, and *anxiety* to her friends). On the fourth day Lord Mansfield delivered his opinion, which was, " That this caſe did not come within the ſtatute of the " 31ſt of Charles the Second; that his brother Foſter had granted " the writ improperly, and no proceedings could iſſue upon it, and if

" the

" the court agreed with him, the writ ought to be quaſhed; but " that the perſons who applied for it were intitled to the writ of " Habeas Corpus at Common Law, and if ſuch was applied for, he " ſhould grant it.—The Habeas Corpus Act (he ſaid) was framed to " correct a particular abuſe in the reign of Charles II. which abuſe " is ſtated in the preamble.——All the perſons named in the Act " are ſheriff, gaolers, and their under officers.—All the regulations " go to commitments by warrant for crimes, or ſuppoſed criminal " matters: but there is not a word, nor an intimation of its " making any deviation from the Habeas Corpus at Common Law, " in caſes of private detention, without any legal authority, where " there is no crime alledged, nor any warrant of commitment. " —In the noted caſe of Aſhby and White, when all the powers and " all the operations of the writs of Habeas Corpus were conſidered " by many great and able men of all parties and of all diſtinctions, it " was *not* adjudged that the Habeas Corpus Act extended to all caſes of " impriſonment whatſoever; it was adjudged, *not* to extend to the " caſe of a commitment by order of the Houſe of Commons.—There " are penalties inflicted on the judges in caſe they do not iſſue the " writ; and on ſheriffs and gaolers, and other officers, in caſe they " do not *obey* it. Thus the Habeas Corpus Act, though remedial in " its object, is inforced wholly by penalties. It is therefore, as to its " executive parts, a mere *penal* law: this court can extend no penal " law further than the letter of ſuch law warrants. This Act lays no " penalty but on judges who refuſe the writ, and on the officers of " the law who detain perſons that have been committed for crimes " or ſuppoſed crimes upon warrants. It lays no penalty for the de- " tention of any perſon where there is no crime nor ſuppoſed crime, " nor any warrant of commitment. As he thought, therefore, the " writ granted by Mr. Juſtice Foſter was not within the ſtatute, no " attachment could iſſue upon it."

Mr. Juſtice Denniſon (who was a mere ſpecial pleader, and of an underſtanding very well adapted to that branch of his profeſſion) concurred

curred with Lord Mansfield, but ſeemed to reſt more on the want of a precedent to attach a peer in that caſe, than in any reaſoning on the defect of the Habeas Corpus Act.

Foſter on the contrary maintained the propriety of the writ that he had iſſued, and that the caſe in queſtion certainly came within the meaning, and within the known execution of the Habeas Corpus Act. It is true (he ſaid) " the preamble and the general proviſions of the " Act go to commitments upon warrant for real or ſuppoſed crimes; " but the title of it (which is alſo an indication of its meaning) is " *general*; *'Tis an Act for the better ſecuring the liberty of the ſubject*; and " there are words that authorize the general appellation of it; for " in the firſt enacting clauſe it is ſaid, that " whenſoever any perſon " or perſons ſhall bring any Habeas Corpus directed unto any ſheriff " or ſheriff's gaoler, miniſter, *or any other perſon whatſoever, &c.* It " ſeems then clear, that as the writ might be *directed* to all perſons " whomſoever, it ought to be *obeyed* by all perſons whatſoever who " kept any one in unlawful cuſtody. We are not to ſuppoſe that the " legiſlature in an Act *for the better ſecuring the liberty of the ſubject* " meant to *give* a remedy to ſuch as are accuſed of crimes, and *deny* " it to thoſe who had no crime imputed to them. But, if the opera- " tions of the Act are to be ſo narrowed, beſides the latitude given to " domeſtic tyrannies of all ſorts, a government that may be diſpoſed " to arbitrary impriſonments, needs only to omit the allegation of a " crime, and the form of a warrant, then will the ſtatute of Habeas " Corpus be rendered uſeleſs. In the caſe of Aſhby and White, " eleven of the judges were of opinion, that perſons committed by " a warrant of the Houſe of Commons could not be delivered by the " Habeas Corpus Act, becauſe thoſe eleven judges thought, that the " court had no juriſdiction over an Act done by the Houſe of Com- " mons.—But there is no trace of any ſuch opinion being then held, " as that the Habeas Corpus Act did not extend to every caſe, and " over every perſon, that is amenable to the juriſdiction of this court. " The writs then iſſued were all marked Per Stat. 31. Car. II. Lord

" Chief Juſtice Holt granted thoſe writs, whoſe opinion is on re-
" cord, and does his memory great honor. The ſame opinion was
" held by Lord Somers, Lord Cowper, Sir Joſeph Jekyll, with all the
" friends of liberty and the conſtitution. My own judgment in this
" matter is not a little ſtrengthened by the contrary opinion being
" held by the Earl of Oxford, Lord Bolingbroke, and others, who
" carried high the prerogative of the crown; who overturned the
" Whig intereſt; and who endeavoured to defeat the Proteſtant ſuc-
" ceſſion.—But what weighs moſt on my mind, and what I think
" ought to rule the court, is, that we have now no right to alter the
" courſe of law, which has run in the ſame channel from the year
" 1679 to the preſent hour. Every writ of Habeas Corpus iſſued ſince
" that time has been marked Per Stat. 31 C. II. and executed accord-
" ingly.

" *Conſuetudo Legum eſt interpres.*

" We have the practice of near a century for the liberal and rational
" conſtruction of this Act; and practice ought, if ever, to be our
" guide, when it coincides with reaſon and humanity, and when it
" enforces the ſpirit, without contradicting the letter of a law, which
" bears the title of, " *An Act for the better ſecuring the liberty of the*
" *ſubject.*"

Sir Edward Wilmot (ſince Chief Juſtice of the Common Pleas) inclined to Foſter's opinion, but having ſome doubt upon the matter he withdrew from the bench.—In this manner judgment was given by Lord Mansfield and Judge Denniſon; *and thus* all caſes of private impriſonment, however violent or cruel, were totally exempted from the benefit of the Habeas Corpus Act.

Some time after there was a writ moved in the King's Bench to bring ſome *impreſſed* men before the Court. There being no crime nor warrant of commitment, Lord Mansfield, in purſuance of his late doctrine, denied the writ according to the ſtatute, but granted one at Common Law. Extenſive as the powers of preſs-warrants are, and

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the Habeas Corpus Act not allowed to apply to ~~in~~ that caſe, there was a pretty general alarm *. Lord Mansfield however thought proper, if the writ of Habeas Corpus was diſobeyed, to make a rule of court to be ſerved upon the officer; and this is what Sir William Blackſtone means by ſaying, that " *in ſubſequent times the Habeas Corpus Act has reduced the method of proceeding on theſe writs (though not within the reach of that ſtatute, but iſſuing merely at the Common Law) to the true ſtandard of law and liberty* †." An attachment, you know, may follow the diſobedience of a *rule of court*. This rule of court therefore may be as quick remedy as the Act itſelf. But unfortunately a *rule of court* is not a *writ of right*; it has no proceſs but what flows from the will and diſcretion of the court; which is not (if I may preſume to differ from Judge Blackſtone) the true Engliſh ſtandard of law and liberty.

This rule of court did not however quiet the apprehenſions that were raiſed upon Lord Mansfield's conſtruction of the Habeas Corpus Act. Mr. Pitt, and Mr. Pratt (now Lord Camden) took the matter up in parliament, and propoſed a new Bill to enforce and invigorate the old one. It paſſed the Commons, but was thrown out by the Lords. The Lord however (on the motion of the Earl of Hardwick) ordered the twelve judges to prepare another bill of the ſame import and tenor.

The judges never obeyed this order. Foſter indeed prepared a new bill, but age and infirmities grew upon him, and he was prevailed

* In the courſe of the proceeding Lord Mansfield put a queſtion, which was anſwered in another queſtion by Sir Michael Foſter.

If (ſays his lordſhip) in times of war every ſoldier and every ſailor, that has been impreſſed, may come here and demand his diſcharge, what will become of the ſtate?—— If (ſays Foſter) an impreſſed man is to be denied the remedy of Habeas Corpus, what will become of the rights of the ſubject?

† On a Committee of the Houſe of Commons to enquire into the ſtate of private Mad-houſes, it appeared, that the friend of a perſon confined upon a falſe pretence of lunacy, applied to Lord Mansfield for a writ of Habeas Corpus, which was refuſed.

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upon not to bring it forwards. The draft is ſtill in being; 'tis in the hands of his nephew, a very worthy gentleman, who inherits the principles of that upright, firm, and conſtitutional judge, Sir Michael Foſter.

You may wonder, perhaps, that Lord Chatham did not renew this ſubject on his return to office and power; 'tis pity he forgot it: for if that great man, amidſt all his tranſient acquiſitions of dominion and glory, had beſtowed one mite on the conſtitution, that mite would grace his memory more than all the laurels on his tomb.

It is high time that I ſhould bring this long and tedious letter to a concluſion, but I hope you will forgive me for endeavouring to ſhow you to what a ſkeleton Lord Mansfield has reduced our Habeas Corpus Act. When Lord Bolingbroke exulted in the pre-eminence which that law gave him above all other freemen, he ſuppoſed it an univerſal, not a partial remedy, demandable of every judge, at every hour, and by every Britiſh ſubject. But, if you give it your countrymen in its preſent ſtate, they will have nothing to thank you for.

In the Lords remonſtrance 1704 you will find the following paragraph: "*The Habeas Corpus Act, in times of imminent and viſible danger, was in the late reign ſuſpended by Acts of Parliament for ſome ſhort time, and yet (ſo ſacred was that law held) that theſe Acts paſſed with great reluctancy, and one of the arguments, that prevailed moſt for agreeing to that temporary ſuſpenſion, was, that it would be an unanſwerable evidence to all future times, that this Act could never be ſuſpended afterwards, by any leſs authority than that of the whole legiſlature.*

In a later reign (and in better times than theſe) an Engliſh Prime Miniſter induced the parliament to ſuſpend the Habeas Corpus Act for the ſingle purpoſe of keeping Sir William Wyndham in the Tower, whoſe weight and abilities had become formidable in the Houſe of Commons. But if the Bill paſſes with a ſuſpending clauſe in Ireland, your miniſters will want no law to impriſon whomſoever they pleaſe, and

and may do of right what Charles the Iſt. did by violence. Reaſons of ſtate lie in the breaſts of miniſters; they may always *pretend* exigencies of ſtate whether they exiſt or no: this ſuſpending power will be a *ſword of Damocles* in their hands, to be dreaded moſt by thoſe who are moſt diſtinguiſhed by the brilliancy of their parts, the ſoundneſs of their principles, and the integrity of their minds.

But this is not all the miſchief: for in Ireland you have the benefit of Habeas Corpus at Common Law, which is at all times a ſure tho' ſlow remedy, and, if peradventure it ſhould be the will and pleaſure of the Chief Juſtice to enforce it by a rule of court, may be ſpeedy and efficacious. But Habeas Corpus, though a writ of right, is not a writ of courſe; pretences may be found to excuſe a denial of it; and if the miniſters of the crown with the ſanction of law ſuſpend the ſtatute, the judges will plead the ſame authority for the ſuſpenſion of Common Law.

If then the Bill ſhould paſs with a ſuſpending clauſe, its title ought to be, *An Act for the better enabling the Servants of the Crown to take away the liberty of the ſubject.*

I am, &c.

P. S. The Habeas Corpus Act has long wanted reparation and amendment in the Engliſh parliament. I have often wiſhed for one of theſe things to be done:

Either to bring out the draft that was prepared by Mr. Juſtice Foſter, and take that for the model of a new law;

Or to ſtrike out the preamble of the Habeas Corpus Act, and take the reſolution of the Lords in 1704, that " Whereas the writ of Habeas Corpus may not be denied, but ought to be granted to every man that is committed to priſon or otherwiſe reſtrained, Be it Enacted &c. &c.—Then apply all the penalties and proviſions, together with the exceptions of the Habeas Corpus Act.

And to direct a proceeding by law, like Lord Mansfield's Rule of Court, to enforce at all times, and in all caſes, an immediate obedience to the writ.

" Provided alſo, and be it further enacted by the authority afore-
" ſaid, That it ſhall and may be lawful to and for any priſoner and pri-
" ſoners as aforeſaid to move and obtain his or their Habeas Corpus,
" as well out of the high court of Chancery or court of Exchequer,
" as out of the courts of King's Bench or Common Pleas, or either of
" them; and if the ſaid Lord Chancellor or Lord Keeper, or any Judge
" or Judges, Baron or Barons for the time being, of the degree of
" the coif, of any of the courts aforeſaid, in the Vacation time, upon
" view of the copy or copies of the warrant or warrants of commit-
" ment or detainer, or upon oath made that ſuch copy or copies were
" denied as aforeſaid, ſhall denie any writ of Habeas Corpus by this
" act required to be granted, being moved for as aforeſaid, they ſhall
" ſeverally forfeit to the priſoner or *party grieved*, the ſum of five hun-
" dred pounds, to be recovered in manner aforeſaid."

OBSERVATION. The penalty of £500 is forfeited in caſe the Habeas Corpus ſhould be denied to the *party grieved* as well as to a priſoner. An expreſſion, which clearly proves that the benefit of the Act was meant, as it was originally conſtrued and executed, to all perſons *grieved* by reſtraint.

THE END.